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No. 143

In the Supreme Court of the United States

OCTOBER TERM, 1957

MYER KLIG, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. 15–29) are not yet reported. The opinion of the District Court (Pet. App. 13–15) is also not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1957 (Pet. App. 29). The petition for a writ of certiorari was filed May 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the Internal Security Act of 1950, one who had been a member of the Communist Party

of a foreign state, but had terminated his membership a number of years before his entry into the United States before 1950, could be deported because of such membership prior to entry.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950 enacted on September 23, 1950, 64 Stat. 1006, 1008, provided in part as follows:

> That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, * * *.

Section 4 under the aforesaid Section 22 provided in part:

> (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in

the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the District of Columbia Circuit affirming the order of the district court which had dismissed his action for a declaratory judgment nullifying an order for his deportation.

The facts are not in dispute. Petitioner, a native of Russia, and a naturalized Canadian citizen, was admitted to the United States for permanent residence in 1941. He reentered the United States after a visit to Canada in 1945. A final order of deportation was issued against him in 1951, based on the admitted fact that from 1929 to 1932 he had been a member of the Communist Party of Canada. No proof was offered in this deportation hearing as to the nature of the Canadian Communist Party or its advocacy of violence. Petitioner was ordered deported under Section 22 of the Internal Security Act of 1950 as one who at the time of entering the United States was "one of the classes of aliens" subsequently enumerated in Section 1 (2) of the 1950 Act, *i. e.*, an alien who "at any time * * * shall have been" a member of the Communist Party of a foreign state. The fact of past membership in the Communist Party of a foreign state was held to be grounds of deportation under the 1950 Act irrespective of whether it would have been a ground for exclusion at the time of

entry in 1945. Judge Washington in his dissent below summarized the point at issue as follows (Pet 25):

> The question which divides us in this case is whether the reference in Section 4 (a) to the "classes enumerated" in Section 1 (2) of the exclusion statute incorporates only the classes enumerated in letters (A) through (H), or those classes plus the preliminary matter in (2) relating not to classes as such but to the time of membership in the classes enumerated. Under the first construction, which is mine, Section 4 (a) would require the deportation of an alien who was "at the time of entering the United States, or has been at any time thereafter" a member of the Communist Party of any foreign state; this would not reach Klig. Under the other view, Section 4 (a) would require the deportation of an alien who "at the time of entering the United States or at any time thereafter" was an alien "who at any time shall be or shall have been" a member of the class "who are members of the Communist Party" of any foreign state; the majority adopts this reading of the statute to deport Klig.

DISCUSSION

The only issue in this case is whether, under the Internal Security Act of 1950, an alien who had been a member of the Communist Party of a foreign country but had terminated his membership prior to his entry into the United States before 1950 could be deported on proof of the fact of such membership. The issue concerns only those who had been Communist or other totalitarian party members before

entry, who entered before September 23, 1950 (the date of enactment of the Internal Security Act which made such entry illegal), and against whom deportation proceedings were instituted or in process while the pertinent provisions of the 1950 Act were in effect, *i. e.*, the period from September 23, 1950 to December 24, 1952. Under the present law, Section 241 (a) (1) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251 (a) (1)), an alien is deportable for acts committed prior to entry only if he was "excludable by the law existing at the time of such entry." This means that as to any alien who entered the United States in the period between 1940 and 1950 (*i. e.*, the period after the Alien Registration Act made past membership in a proscribed organization a basis for exclusion but before the Internal Security Act of 1950), membership in a Communist Party prior to entry will support an order of deportation only if there is proof that the alien was excludable as one who was or had been a member of an organization that advocated "the overthrow by force or violence of the Government of the United States or of all forms of law."[1] Since no proof on this issue was offered in this proceeding, one in petitioner's position could not now be deported on the basis of the record in this case.[2]

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[1] This is the language of the Anarchist Act of October 16, 1918, 40 Stat. 1012, but it was not until the Alien Registration Act of 1940, 54 Stat. 673, that past membership in such an organization was made ground for exclusion.

[2] Since there was no proof as to the nature of the Communist Party of Canada in the period of petitioner's membership, the government did not argue below and the court below

The holding of the majority below that the 1950 Act required the deportation of all aliens who had ever been members of any Communist Party, even though membership had terminated before entry, is admittedly in conflict with that of the Fifth Circuit in *Berrebi* v. *Crossman*, 208 F. 2d 498.[3] However, because of the change by the 1952 Act, the conflict has limited significance. So far as the central records of the Immigration and Naturalization Service reveal, the point is directly involved only in the instant case. There may be a few others, like *Bonetti* v. *Brownell*, No. 94, presently pending on petition for a writ of certiorari, where an order of deportation under the 1950 Act could be sustained on the theory of the decision below even though the actual order of deportation was based on other grounds (see footnote 5 of the government's brief in opposition in No. 94). It is unlikely, however, that more than three or four cases will possibly be affected by the decision below.

On the narrow question presented by this case, the decision of the majority below seems to be in accord

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did not decide that he is deportable because he was shown to be excludable at the time of his entry. There is no claim that the nature of the Communist Party as one which advocates the overthrow of government could be presumed for the purposes of the 1940 Act without proof to such effect in the administrative hearing. Petitioner's reference to *Martinez* v. *Neelly*, 197 F. 2d 462 (C. A. 7), affirmed, 344 U. S. 916 (Pet. 8), is thus inapposite.

[3] In *Berrebi* v. *Crossman*, the government stipulated that the alien, a former member of the Communist Party of Tunisia, had been lawfully admitted before 1950. In this case, while there was no concession of lawful admission, there was a deficiency of proof to show that the alien was excludable at the time of his entry.

with the intent of Congress when it passed the 1950 Act. That Act represented the strongest recent position of Congress for the exclusion or deportation of aliens who had ever participated in Communist activity, a position which was modified to some degree in the 1952 legislation. Thus the 1950 Act provided that there could be no suspension of deportation under any circumstances for former alien members of the Communist Party whereas the 1952 Act (Section 244 (a) and (c), 8 U. S. C. 1254 (a) and (c)) now makes provision for suspension under certain conditions.

Contrary to petitioner's statement (Pet. 10) that the Internal Security Act of 1950 presents no independent legislative history on the subject, we think that the legislative history indicates that Congress intended to require the deportation of any alien who had ever belonged to any Communist Party. S. Rep. No. 2230, 81st Cong., 2d Sess., p. 7, referring to Section 3 (a) of S. 1832, a provision like that of the 1950 Act here involved, said:

> Section 3 (a) authorizes the Attorney General, at any time after entry, to take into custody and deport the aliens falling within the classes mentioned in the bill. Such aliens are deportable for past membership in the proscribed classes as well as present membership, *regardless of whether such membership has ceased either before or after entry.* [Emphasis supplied.] *

* S. 1832 was passed by the Senate without debate, 96 Cong. Rec. 12058, 12060, and then incorporated in the Senate internal security bill, S. 4037, 81st Cong., 2d Sess. A report on that bill,

For the foregoing reasons, we believe that there is no need to grant the petition for a writ of certiorari with relation to the questions raised. We note, however, that in addition to ordering reargument in *Rowoldt* v. *Perfetto,* No. 5, this Term, involving issues as to what constitutes proof of membership in the Communist Party, this Court has deferred action on various petitions for certiorari involving issues of Communist Party membership by aliens, including that in *Bonetti* v. *Brownell,* No. 94, this Term, referred to above, where the alien did not claim to have been merely a nominal member of the Communist Party. In this case the record as to petitioner's membership in the Communist Party of Canada in 1929 to 1932 consists only of his admission to such effect, without amplification as to the nature of his membership. Since the decision in *Rowoldt* v. *Per-*

S. Rep. 2369, 81st Cong., 2d Sess., p. 12, contains language almost identical with that quoted above from the prior report. This aspect of the Internal Security Act of 1950 was not thereafter the subject of controversy. The provision which became Section 22 of the 1950 Act was not in the internal security bill as it passed the house (see H. Rep. No. 3112, 81st Cong., 2d Sess., p. 48) but was included in the conference substitute. The debate in the House on the conference bill, and in overriding the Presidential veto, did not touch directly on Section 22. The fact that no specific reference was made in the Conference Report on the final legislation (H. Rep. 3112, 81st Cong., 2d Sess.) to the particular issue here involved cannot therefore be given the significance attached to that fact in the dissent below (Pet. 27–28). The fact is that the particular language ultimately enacted had been given the construction adopted in this case by the earlier detailed analyses of the Senate Reports.

fetto could have some bearing on this aspect of this case, even though this issue was not the subject matter of this litigation, the Court may wish to defer action on this petition until after decision in the *Rowoldt* case.

Respectfully submitted.

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